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No. 00-0927

In The

Supreme Court of the United States

ALEXIS M. HERMAN, SECRETARY OF LABOR,

Petitioner,

v.

MALLARD BAY DRILLING, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondent submits that the real issues for review are as follows:

1. Whether the Court of Appeals correctly decided that the Occupational Safety and Health Act ("OSH Act"), 29 U.S.C. §§ 651 *et seq.* and its implementing regulations do not apply to the working conditions of seamen working aboard vessels operating in navigable waters when the United States Coast Guard has been granted the statutory authority to promulgate and enforce regulations for the promotion of safety and health on such vessels and has in fact promulgated such regulations.

2. Whether the Court of Appeals correctly determined that the United States Coast Guard is the exclusive federal agency charged with the responsibility for regulating the working conditions of seamen on vessels – whether they be inspected or uninspected – on navigable waters such that OSHA's jurisdiction is preempted by the Coast Guard under § 4(b)(1) of the Act.

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CITATIONS OF OPINIONS AND JUDGMENTS BELOW

The opinions and judgments of the Administrative Law Judge, OSHA Review Commission and Fifth Circuit Court of Appeals are contained in Petitioner's Appendix to its Petition for Writ of Certiorari. All references by Respondent in its Opposition Brief will be to those contained in Petitioner's Appendix.

INTRODUCTION

The Petitioner's Brief incorporates virtually the same arguments unsuccessfully advanced by the Secretary of Labor in the Fifth Circuit Court of Appeals (*see* Decision rendered June 2, 2000, Appendix A, reversing the Order of the Occupational Safety and Health Review Commission dated December 28, 1998, *see* Appendix C at 20a-21a, vacating the citations issued against respondent by OSHA See Appendix B at 18a-19a, and rendering Judgment in favor of Mallard), and on Petition for Rehearing before the Fifth Circuit which was denied on August 8, 2000 (*see* Appendix G at 66a-67a). Since the arguments advanced by the Secretary in its Petition have been exhaustively considered and rejected on two separate occasions by the United States Fifth Circuit Court of Appeals, Respondent, Mallard Bay Drilling, LLC ("Mallard") submits that no worthwhile purpose would be served by responding in detail to the Secretary's lengthy Petition. The flaws in the Secretary's Petition are obvious. Nevertheless, since the Secretary's Petition is misleading, both factually and legally, Respondent respectfully

responds to those contentions which are legally erroneous and lack evidentiary support in the record.

STATEMENT OF THE CASE

Mallard owns and operates drilling rigs and barges for oil and gas exploration from its principal place of business in New Iberia, Louisiana. Mallard is owner and operator of the MR. BELDON, otherwise designated as Mallard Rig 52, an inland drilling barge, (Official No. 644167), measuring 190 feet in length and 50 feet in breadth and weighing approximately 1,482 tons with its home port in New Orleans, Louisiana. The MR. BELDON is a special purpose drilling barge and one of ten classified deep drilling barges owned by Mallard in the United States. It is a non-self propelled barge which is moved to location by tugboat.

The MR. BELDON was built in 1981 and construction plans were reviewed by the American Bureau of Shipping ("ABS"). Following initial construction, the rig was neither classed nor reinspected by the ABS. While Rig 52 received a Certificate of Documentation from the United States Coast Guard, it is considered an uninspected vessel, i.e., it does not have a Coast Guard Certificate of Inspection.

While the MR. BELDON is classified as an uninspected drilling vessel, it nonetheless must comply with a plethora of Coast Guard regulations regarding navigation, safety, and working conditions of seamen. Douglas Halsey, a marine safety expert and 20-year Coast Guard veteran, who testified on behalf of Mallard, performed a

vessel inspection of the MR. BELDON. Halsey confirmed that the MR. BELDON's living quarters met or exceeded Coast Guard requirements for structural fire protection, habitability, machinery spaces, electrical distribution system, fire prevention, life saving, communication, abandon ship, training and safety programs. While the MR. BELDON was not manned by Coast Guard licensed personnel, all of its crewmembers were deemed to be "seamen" who were afforded protection under federal law as well as protection through the United States Coast Guard.

On June 16, 1997, the MR. BELDON was located at Little Bayou Pigeon, a navigable body of water in the Parish of St. Martin in the territorial waters of the State of Louisiana. On that date, the MR. BELDON was performing oil and gas drilling operations pursuant to a drilling contract with Denbury Management, Inc., drill operator on State Lease 411.

A blowout occurred during the evening hours in the course of drilling operations which resulted in the death and personal injuries of individuals. On the morning of June 17, 1997, three Coast Guard personnel, Captain John Grez, Lt. Jason Neubauer and Lt. Com. Ken Carlite of the U.S. Coast Guard, Marine Safety Office in Morgan City, Louisiana, conducted a full investigation into this casualty. The Coast Guard set up a command center in Butte Larose, Louisiana, and interviewed various Mallard employees, located both on the MR. BELDON and at its main office in New Iberia, Louisiana. The United States Coast Guard spent approximately six months investigating this matter at which time it submitted an extensive post casualty report. (See Appendix D)

OSHA, on the other hand, and in particular, its investigator, Mike Spohrer, conducted no investigation into this casualty. To quote Mr. Spohrer, he "stayed in the background" and did not personally interview any Mallard employees nor did he ever step foot aboard the MR. BELDON to conduct an actual inspection of the vessel itself. In short, he did nothing but "ride the coattails" of the investigation performed by the United States Coast Guard.

This case arises from citations issued against Mallard concerning the "working conditions" of "seamen" aboard the Mallard Rig 52, a/k/a MR. BELDON. Following this marine casualty, the Secretary issued the following citations for alleged violations of the Act:

(i) Serious citation for violation of Section 5(a)(1) of the Act for failing to timely evacuate employees on board the drilling rig;

(ii) Serious citation pursuant to 29 C.F.R. Section 1910.120(q)(1), for failing to develop and implement an emergency response plan to handle anticipated emergencies; and

(iii) Serious citation pursuant to 29 C.F.R. Section 1910.120(q)(6), for failing to train employees in emergency response.

Mallard answered the Complaint and also raised the defense that OSHA lacked jurisdiction to assess any penalties against it and/or said jurisdiction was preempted by the U.S. Coast Guard. Prior to the hearing, the Secretary and Mallard agreed that the parties would not litigate the merits of the citations; rather, the parties

consented that Mallard would pay stipulated penalties for the citations contingent upon an ultimate determination of the jurisdictional issues arising under Section 4 of the Act, 29 U.S.C. § 653.

The matter was tried before Administrative Law Judge Ken Welsch on April 27, 1998 in New Orleans, Louisiana. On November 10, 1998, the Administrative Law Judge ruled in favor of the Secretary on the jurisdictional issue. (See Appendix B at 9a) Mallard subsequently filed a Petition for Discretionary Review with the OSHA Review Commission which petition was denied by the Commission on December 28, 1998. Mallard timely filed its Petition for Review with the United States Court of Appeals for the Fifth Circuit on February 2, 1999, which reversed the decision of the OSHA Review Commission, vacated the citations issued against Mallard and rendered judgment in favor of respondent.

SUMMARY OF ARGUMENT

Mallard respectfully submits that the Department of Labor lacks jurisdiction to assess any citation or penalties against Mallard which arise out of a marine casualty aboard the MR. BELDON. The United States Coast Guard is the exclusive federal agency charged with the responsibility of regulating the "working conditions" of "seamen" on vessels – whether they be inspected or uninspected – on navigable waters. OSHA is preempted by the United States Coast Guard since this matter involves a marine casualty over which the United States

Coast Guard has exclusive and pervasive jurisdiction and has, in fact, exercised that jurisdiction.

OSHA regulations do not apply to the MR. BELDON for several good reasons:

(1) The Coast Guard, not OSHA, has exercised its exclusive authority to provide safety standards for vessels;

(2) Excluding OSHA coverage of the MR. BELDON promotes uniformity in the law and precludes duplicity of federal investigations; and

(3) OSHA jurisdiction does not extend its reach to include vessels;

The Secretary strenuously argues that it has jurisdiction in this case due to the fact that the MR. BELDON is an uninspected vessel; however, the Secretary's argument misses the mark. Whether the MR. BELDON was an inspected or uninspected vessel is much ado about nothing. The long and short of this matter is this: the Coast Guard's jurisdiction over *all vessels on navigable waters* is complete and pervasive and is not diminished one iota by the categorization of a vessel as either inspected or uninspected. As both Chief Warrant Officer Grez and former Lt. Commander Douglas Halsey testified, the Coast Guard does, in fact, have jurisdiction to board, investigate, seize and even sink *uninspected* vessels. With that said, there can be little question but that the Coast Guard's regulations over uninspected vessels is pervasive and unencumbered.

Section 4(b)(1) provides that OSHA does not apply to the working conditions of employees regulated by other

federal agencies. Congress has delegated to the United States Coast Guard broad authority to "promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States." 14 U.S.C. § 2. The Coast Guard has in fact exercised this authority and promulgated substantial regulations governing vessels operating on navigable waters and the crews on those vessels.

Moreover, preemption under Section 4(b)(1) does not depend upon the extent to which the other federal agency has exercised its statutory authority. The ALJ and Commission erroneously interpreted Section 4(b)(1) to allow for OSHA preemption only "as to those working conditions actually covered by the agency regulations." The Fifth Circuit properly rejected this "nook and cranny" interpretation of Section 4(b)(1).

Lastly, vessels operating in state territorial waters do not constitute "work places" within the meaning of Section 4(a) of the Act. Simply put, navigable waters are not one of the enumerated United States territories listed in that section.

ARGUMENT

I. The United States Coast Guard, Not OSHA, Is The Federal Agency Charged With The Responsibility For Regulating Safety Over Seamen.

This case concerns the jurisdictional issue of the applicability of OSHA standards to the working conditions of seamen aboard a vessel regulated by the United States Coast Guard. Section 4(b)(1) of the Act states:

> Nothing in this chapter shall apply to working conditions of employees with respect to which other federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

29 U.S.C. § 653(b)(1).

The United States Coast Guard has been granted statutory authority by Congress to ensure the safety and health of seamen who work aboard vessels such as the MR. BELDON. Congress established the Coast Guard as part of the Department of Transportation in 1915, several decades before OSHA was even passed. 14 U.S.C. § 1. Congress defined the Coast Guard's primary duties to include the following:

> The Coast Guard . . . shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department . . . 14 U.S.C. § 2.

Clearly, the living and working conditions of seamen aboard vessels are unique and differ substantially from those of employees in land-based work places. As aptly stated by this Court more than half a century ago, "Ever since men have gone to sea, the relationship of master to seaman has been entirely different from that of employer to employee on land." *Southern S.S. Co. v. NRLB*, 316 U.S. 31, 38, 62 S.Ct. 886, 890, 86 L.Ed. 1246 (1942).

The Fifth Circuit recognized that pursuant to this statutory grant of authority, the Coast Guard is the exclusive federal agency which exercises authority over the working conditions of seamen. *See Clary v. ODECO*, 609 F.2d 1120 (5th Cir. 1980); *Donovan v. Texaco, Inc.*, 720 F.2d 825 (5th Cir. 1983). Accordingly, the Fifth Circuit correctly held that Section 4(b)(1) precludes the application of OSHA standards to the "working conditions" of "seamen".

Clary v. ODECO, supra, is the leading Fifth Circuit case to discuss the Coast Guard's preemption of OSHA jurisdiction with respect to the "working conditions" of "seamen" working on vessels in navigable waters. In *Clary*, the plaintiff-roustabout suffered a knee injury on a submersible drilling vessel when he tripped over a retaining wall on a rig. Pursuant to stipulation by the parties, the plaintiff sought recovery under the Jones Act and general maritime law. Plaintiff specifically alleged that it was a violation of OSHA regulations not to have the retaining wall upon which he tripped color coded yellow as to make it more visible. The trial court, however, refused to allow plaintiff to introduce into evidence OSHA regulations pertaining to color coding on the grounds that such regulations did not apply to vessels in

navigation. *Clary v. ODECO*, 429 F.Supp. 905 (W.D.La. 1977).

In affirming the decision of the trial court, the Fifth Circuit articulated three persuasive reasons for refusing to allow OSHA regulations proffered by plaintiff into evidence. *Clary v. ODECO*, 609 F.2d 1120 (5th Cir. 1980). First, the Occupational Safety & Health Act provides:

> Nothing in this chapter shall apply to working conditions of employees with respect to which other federal agencies exercise statutory authority to prescribe or enforce standards or regulations affecting the safety or health. Section 4(b)(1) codified in 29 U.S.C. § 653(b)(1).

This Court then noted:

> The Coast Guard is the federal agency exercising statutory authority over the working conditions of seamen. Coast Guard regulations cover, among other things, standards governing the safety and health of persons working on vessels.

Id. at 1121.

Second, this Court emphasized that the OSHA commission has "disclaimed an intention to promulgate standards applicable to seamen," and has consistently conceded jurisdiction over the safety and health of seamen to the Coast Guard. Finally, the Court noted that the regulations proffered by plaintiff simply did not apply to a "special purpose drilling vessel in navigation." *See id.* at 1122.

Like the plaintiff in *Clary*, crew members aboard the MR. BELDON are seamen, not longshoremen. Like the plaintiff in *Clary*, the crewmembers aboard the MR. BELDON were assigned to a "special purpose drilling

vessel." Accordingly, as in *Clary*, the United States Coast Guard, not the Department of Labor, is the federal agency charged with responsibility for the safety and working conditions of seamen aboard the MR. BELDON.

At trial of the case *sub judice*, OSHA's representative, Mike Spohrer, was questioned regarding the purpose of OSHA's involvement in this matter. Spohrer testified that his investigation, like that of the Coast Guard, centered on the "working conditions" of the Mallard crew members. This is exactly what Congress has prescribed the United States Coast Guard to do in all instances! Spohrer's testimony is unequivocal:

> Q: Why was it necessary for you to review this [Memorandum of Understanding] during the course of your inspection?
>
> A: I wanted to be certain that I did have jurisdiction or that OSHA had jurisdiction in this case.
>
> Q: Now at the conclusion of your investigation, did you recommend the issuance of the citations that are at issue in today's hearing?
>
> A: Yes.
>
> Q: And was your recommendations [sic] accepted by your area director?
>
> A: Yes.
>
> Q: *All of the violations that are cited in the items located in the citation, do those conditions relate to the working conditions aboard the rig or to the navigational issues aboard the rig?*
>
> A: *Working conditions.* (emphasis added)

(TR 70-71)

Suffice it to say, this sounds the death knell for OSHA's alleged jurisdiction in this case.

Fifth Circuit precedent is crystal clear and its rationale is irrefutable. The United States Coast Guard, not OSHA, is charged with the exclusive responsibility for regulating and prescribing standards for the "working conditions" of seamen serving aboard vessels on navigable waters. The Coast Guard's jurisdiction preempts not only OSHA but every other federal agency which would otherwise attempt to assert jurisdiction over a marine casualty.

Donovan v. Texaco Inc. is a subsequent Fifth Circuit decision which reaffirms the rationale of *Clary* and establishes beyond cavil that OSHA jurisdiction is preempted in this matter. *Donovan v. Texaco Inc.*, 720 F.2d 825 (5th Cir. 1983). In *Donovan*, the plaintiff was a Coast Guard licensed engineering officer employed by Texaco in its deep sea fleet. Plaintiff initiated an action against Texaco based upon OSHA's prohibition of retaliatory discharge of a complaining employee. In rejecting the plaintiff's claim, the court succinctly stated:

> It is the law of this circuit that OSHA regulations do not apply to working conditions of seamen on vessels in navigation.

The Court then examined the language in Section 4(b)(1) and noted:

> Given *Clary*, which holds that with respect to seamen, the Coast Guard is such an agency for present purposes, we may redact this section as follows: **NOTHING IN OSHA SHALL APPLY TO WORKING CONDITIONS OF SEAMEN ON VESSELS**. (emphasis added)

The Fifth Circuit in *Donovan*, citing *Dillingham Tug & Barge Corp.*, 10 BNA OSHC 1859 (1982), noted that the Occupational Safety & Health Review Commission has itself concluded that OSHA has no applicability to the working conditions of seamen. Both the Commission and the Fifth Circuit recognized that 29 U.S.C. § 653(b)(1) "creates – in view of the Coast Guard's comprehensive regulation and supervision of seamen's working conditions – an industry-wide exemption for seamen serving on vessels operating on navigable waters." *Donovan*, 720 F.2d at 826.

The *Donovan* Court further opined that the regulatory authority of OSHA is completely abrogated for a particular industry if another federal agency exercises "general and pervasive" regulation of that industry. *Id.* at 826. The court concluded that the Coast Guard's regulation of vessels and seamen thus displaces OSHA coverage as to the safety and health of persons working on vessels. *Id.* at 826.

Little need be said regarding the Secretary's claim that the Memorandum of Understanding (see Appendix F) shifted responsibilities for the working conditions of seamen from the United States Coast Guard to OSHA. In short, the Memorandum of Understanding is not a congressional pronouncement; rather, it is an informal memorandum between two federal agencies. Congress is the only entity which can shift responsibility from the United States Coast Guard to another federal agency. Until such time that Congress enacts legislation which does shift responsibility for the working conditions of seamen aboard uninspected vessels from the Coast Guard to OSHA, neither the Commander of the United States

Coast Guard nor the Director for OSHA is at liberty to legislate responsibilities among themselves. See *Donovan v. Texaco, Inc.*, 720 F.2d 825, 827-28, n.3 (5th Cir. 1983), in which the Fifth Circuit made it quite clear to the Secretary and the Coast Guard that they are not authorized to overrule Congress' delegation of authority by shifting responsibilities for assuring the safe working conditions of seamen, stating: "It is not for modalities of the federal power to trade functions between themselves in perpetuity by agreement; the will of Congress must control." *Id.*

The United States Court of Appeals for the Fourth Circuit has likewise adopted the rationale of the Fifth Circuit. In *Taylor v. Moore-McCormick Lines, Inc.*, 621 F.2d 88, 92-93 (4th Cir. 1980), the Court stated:

> In summary, we think that Section 2, 14 U.S.C. makes it quite clear what is the proper delineation of responsibility between the Coast Guard and the Secretary of Labor in this area: The Coast Guard has responsibility for the safety of "seamen" under regulations issued by it, whereas the Department of Labor, under OSHA, has statutory responsibility for the safety of longshoremen at work under regulations issued by it. The respective responsibilities, thus established, are exclusive. *Id.* at 92-93.

Mallard acknowledges that other circuits have reached a contrary result. *See In Re Inspection of Norfolk Dredging Co.*, 783 F.2d 1526 (11th Cir. 1986), *cert. den.*, 107 S.Ct. 271 (1986); *Donovan v. Red Star Marine Services, Inc.*, 739 F.2d 774 (2d Cir. 1984), *cert. den.*, 105 S.Ct. 1355 (1985); however, these decisions are based on the erroneous

assumption that the Coast Guard has minimal responsibility for regulating safety on board uninspected vessels, and they completely ignore the Coast Guard's general grant of authority under 14 U.S.C. § 2 and the extensive regulations outside the sub-chapter entitled, "Uninspected Vessels."

i. The Secretary's Characterization of the Mr. Beldon as an Uninspected Vessel Is a Red Herring.

It is of no import whether the MR. BELDON is considered an inspected or uninspected vessel for purposes of OSHA jurisdiction. Simply put, the United States Coast Guard has exclusive responsibility for the safety and working conditions of seamen serving on vessels – both inspected and uninspected. Moreover, the United States Coast Guard has issued regulations and prescribed standards for safety on uninspected vessels in addition to inspected vessels. Numerous sections of the United States Code govern and regulate "in minute detail the rights and duties of seamen." *Donovan v. Texaco Inc.*, 720 F.2d 825, 828 (5th Cir. 1983). In those sections Congress has delegated to the Coast Guard the authority and responsibility for ensuring the safety of seamen and regulating the health of seamen aboard vessels operating on navigable waters.

Contrary to the Secretary's position, the Coast Guard regulates the working conditions aboard uninspected vessels as well as inspected vessels. The primary Coast Guard regulations applicable to seaman are contained in Chapter 1 of Title 46 of the Code of Federal Regulations.

This chapter is broken down into twenty-one subchapters. Subchapter C is entitled "Uninspected Vessel" and sets forth a number of specific regulations protecting against a variety of hazards which may arise in the working environment of seamen aboard uninspected vessels. These regulations are promulgated pursuant to Chapter 41 of Title 46 of the United States Code, in which Congress specifically delegated to the Coast Guard the authority to promulgate and enforce regulations governing uninspected vessels. This chapter of the U.S. Code is entitled "Uninspected Vessels Generally" and the statutes within the chapter make specific reference to safety equipment. *See* 46 U.S.C. § 4102.

The owner or operator of an uninspected vessel that does not comply with the statutory requirements or the Coast Guard regulations applicable to uninspected vessels may be subject to civil penalties and the Coast Guard can actually seize the vessel to satisfy the penalties. *See* 46 U.S.C. § 4106 ("the vessel also is liable *in rem* for the penalty"). This subchapter on uninspected vessels specifically states that the Coast Guard shall have a marine inspector to ensure that the regulations are adhered to and that the working conditions aboard uninspected vessels are safe. *See* 46 C.F.R. § 24.10-15.

The Secretary's position in this case is based on an erroneous assumption regarding the extent of the Coast Guard's authority over inspected vessels. The Secretary represents to this Court that the Coast Guard's regulation of inspected vessels is minimal; however, the Secretary's assertion does not wash when viewed against the facts.

Clearly the Coast Guard's authority is not limited to one chapter of the United States Code dealing specifically with uninspected vessels. As stated earlier, 14 U.S.C. § 2 delegates to the Coast Guard the general authority to "promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States." This general grant of authority is much broader and *includes* safety issues on navigable waters, regardless of the type of vessel. *See Foremost Insurance Company v. Richardson*, 467 U.S. 668, 102 S.Ct. 2654, 2658-59 (1982) (admiralty and maritime rules must apply on navigable waters regardless of the type of vessel involved).

Indeed, numerous other Coast Guard regulations outside the chapter entitled "Uninspected Vessels" govern the working conditions of seamen aboard uninspected vessels. The obvious reason these other regulations are not included in the specific subchapter entitled "Uninspected Vessels" is because they apply to other types of vessels as well. Much like OSHA regulations, these regulations include safety standards and training requirements.

While the statutes and regulations discussed above are intended to prevent injuries aboard uninspected vessels, the Coast Guard has also promulgated regulations for investigating accidents and injuries on vessels when they do occur so that remedial action can be taken if necessary to safeguard against future accidents and injuries. All injuries, including deaths, which may occur on a vessel must be reported to the Coast Guard as required by 46 U.S.C. §§ 6301-6307. The Coast Guard has promulgated extensive regulations pursuant to these statutes for

the reporting and investigation of virtually all marine accidents. *See* 46 C.F.R. Part 4. These regulations apply to "any casualty or accident involving *any vessel* other than public vessels if such casualty or accident occurs upon the navigable waters of the United States." 46 C.F.R. § 4.03-1(a) (emphasis added). Thus, these regulations clearly apply – and even the Secretary concedes – to a privately owned uninspected vessel such as the MR. BELDON.

Moreover, these Coast Guard regulations require the reporting of a marine accident involving an uninspected vessel even when the accident results in no injuries. The regulations clearly specify that they cover *any* accident involving a vessel which *caused* damage "which might affect or impair the seaworthiness of the vessel." 46 C.F.R. § 4.03-1(b). In contrast, OSHA regulations require that employers keep a log of only "recordable" injuries (29 C.F.R. § 1904.2) and that only very serious accidents be reported. (29 C.F.R. § 1904.8). Thus, the Coast Guard regulations applicable to the reporting of accidents involving uninspected vessels are again more protective than OSHA regulations. Indeed, contrary to its reasoning in this case, the OSHA Review Commission fully recognized in its *Dillingham* decision that many other Coast Guard regulations outside those in the chapter entitled "Uninspected Vessels" apply to the working conditions of seamen on uninspected vessels. After discussing the safety regulations which pertain particularly to uninspected vessels, the Commission reasoned:

> In addition, various provisions of other subchapters such as subchapter P – entitled "Manning of Vessels" – apply to uninspected vessels

> as well as other types of vessels. Moreover, the Coast Guard's authority to investigate maritime accidents and to enforce its regulations applies to uninspected vessels as illustrated by the Coast Guard investigation that followed the accident involved in this case. *See* 33 C.F.R. § 1.07-10. Thus, the Coast Guard has prescribed and it enforces regulations that govern the working conditions of seamen aboard both inspected and uninspected vessels operating on navigable waters. *Dillingham Tug & Barge Corp.*, 10 BNA OSHC at 1861.

Indeed, the OSHA Review Commission recognized almost twenty years ago that the distinction between inspected and uninspected vessels makes no difference whatsoever under Section 4(b)(1) of the Act. In *Dillingham* the Commission noted that "the Coast Guard has issued regulations directed at the protection of seamen for uninspected vessels as well as for vessels it inspects and certificates. Thus, there is no distinction between uninspected vessels and inspected and certificated vessels for the purpose of this case." *Dillingham*, BNA OSHC at 1861 n.6. Of course, there is no evidence whatsoever that the Coast Guard's authority or regulations have been diminished in any way since *Dillingham* was decided.

The court in *Donovan* went further to specifically reject the Secretary's contention that preemption under Section 4(b)(1) only applies if the Coast Guard has the specific regulation comparable to the OSHA regulation at issue. *Donovan*, 720 F.2d at 826-827. The Court reasoned that the Secretary's interpretation of Section 4(b)(1) is clearly contrary to Congressional intent:

> Section 4(b)(1) evidences a general Congressional intent to forbid overlapping regulation of

> working conditions in any given industry by multiple federal agencies. Such redundant control programs offer little except confusion governmental proliferation and stultification of enterprise. Congress having declared against them in this instance it is not for us to disagree.

Donovan, at 827. The Court further explained:

> Section after section of the United States Code governs and regulates in minute detail the rights and duties of seamen, down to the form of shipping articles to be signed by them and the contents of their daily diet.

720 F.2d at 828.

The Secretary's false assumption is apparently based on the term "uninspected vessels" which is somewhat of a misnomer. Presumably, the name "uninspected vessel" was used simply because those vessels are not required to be inspected on a definite schedule as are those which are classified "inspected vessels." 46 U.S.C. § 2101(43) defines an uninspected vessel as "a vessel not subject to inspection under § 3301 of this title that is not a recreational vessel." This does not mean however that "uninspected vessels" are not subject to Coast Guard inspections or regulations. Rather, it simply means that they are not subject to Coast Guard inspections on a scheduled basis.

Indeed, the Coast Guard's treatment of uninspected vessels is quite similar to the Secretary's inspections of ordinary workplaces. The Secretary generally inspects workplaces following accidents based on an employee complaint or on a random periodic bases. Similarly, uninspected vessels are subject to Coast Guard inspections

following a marine accident pursuant to a complaint that a particular condition on a vessel is unsafe or unseaworthy and on random periodic bases. Thus, the Coast Guard's regulation of the working conditions of seamen on uninspected vessels is quite similar to OSHA's regulation of ordinary workplaces. Undoubtedly the Secretary believes she has exercised her authority to regulate the working conditions of ordinary work places even though she does not conduct regularly scheduled inspections of those work places. She cannot now credibly contend that the Coast Guard has not exercised its authority when it regulates uninspected vessels in much the same manner. Furthermore, the Coast Guard, not OSHA, has the particular expertise to promulgate and enforce safety regulations for seamen. Mallard respectively submits that OSHA's entry into marine casualties would only confuse and unnecessarily complicate matters- for marine employers as well as the Coast Guard.

II. Preemption Of OSHA Standards Under Section 4(b)(1) Of The Act Does Not Depend Upon Whether The Coast Guard Has A Specific Regulation Identical To An OSHA Regulation

The Secretary argues that OSHA regulations are preempted under Section 4(b)(1) only if the Coast Guard has a specific regulation which is nearly identical to the OSHA regulation. The Secretary's reliance on the so-called "nook and cranny" theory is misplaced.[1]

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[1] The Fifth Circuit has coined the "nook and cranny" interpretation of Section 4(b)(1). *See Donovan v. Texaco Inc.*, 720 F.2d 825, 826 n.1 (5th Cir. 1983).

i. The Nook and Cranny Theory Is Not Supported By The Language of Section 4(b)(1)

There is nothing in the wording of Section 4(b)(1) which makes its preemptive force contingent upon another federal agency having promulgated the same regulation; such an interpretation would make the statute entirely meaningless. The statute simply states that OSHA shall not "apply to working conditions of employees with respect to which other Federal agencies . . . *exercise* statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. § 653(b)(1) (emphasis added).

If preemption depended upon the extent to which another federal agency regulated a particular work environment some descriptive word or phrase would have been needed. For example, the statute could have stated that OSHA regulations do not apply to working conditions in which another federal agency has adopted safety and health regulations which provide "comparable protection" to employees. In fact, the Secretary has unsuccessfully advanced this "nook and cranny" theory to the Fifth Circuit. *See Donovan v. Texaco Inc.*, 720 F.2d 825, 826 n.1 (5th Cir. 1983).

ii. The Phrase "Working Conditions Of Employees" Means The General Work Site In Which Employees Perform Their Daily Task

The "nook and cranny" interpretation of Section 4(b)(1) ignores the meaning of the phrase "working conditions of employees." According to the "nook and cranny" theory advanced by the Secretary each and every

OSHA regulation and standard would create a different working condition within the meaning of the jurisdictional statute. This interpretation is simply nonsensical.

The phrase "working conditions of employees" has been interpreted by the courts to mean the general area or work site in which employees perform their daily tasks. *See United Entergy Services, Inc. v. Federal Mine Safety & Health Admin.*, 35 F.3d 971, 977 (4th Cir. 1994) (holding that power plant located next to and operating in connection with coal mine constituted "working conditions" within the meaning of Section 4(b)(1)); *Columbia Gas of Pennsylvania, Inc. v. Marshall*, 636 F.2d 913, 916-17 (3d Cir. 1980) (defining "working conditions" as being "the discrete work site at a trench"); *Marshall v. Nichols*, 486 F.Supp. 615, 619 (E.D. Tex. 1980), reversed in part on other grounds; *Donovan v. Nichols*, 646 F.2d 190 (5th Cir. 1981) (holding that the entire offshore platform constituted the "working conditions for OSHA jurisdictional purposes").

In the instant case, the jurisdiction of the United States Coast Guard is uncontested. Chief Warrant Officer Grez was specifically questioned with respect to the Coast Guard's jurisdiction over the pertinent casualty and unequivocally testified that the Coast Guard is charged with the responsibility of investigating "marine casualties." Chief Warrant Officer Grez's testimony is illustrative:

Q: What was the purpose of your inspection?

A: The purpose was to investigate a marine casualty.

Q: What is a marine casualty?

A: A marine casualty covers a number of areas: fire, explosion, death, injury, among other criteria, yes, sir.

Q: *Was there any special legislation or regulation of the United States Code that would give you the authority to conduct such an inspection?*

A: *Yes. This investigation was conducted under authority of 46 C.F.R. part 4 as derived from authority in 46 U.S.C. 6301.*

Q: Are there certain conditions that designate whether or not a casualty is considered a marine casualty; a serious marine incident?

A: This one was designated as a serious marine incident. 46 C.F.R. 4.03-2 requires for a designation of a serious marine incident that one or more of the following occur: multiple injuries requiring medical attention, damage of property in excess of $100,000; and I believe there are other criteria in there also. (emphasis added)

Clearly then, the United States Coast Guard had jurisdiction and in fact exercised that jurisdiction in this case.

In short, the clear wording of Section 4(b)(1) states that if another federal agency has exercised statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health in some working environments then OSHA standards and regulations do not apply. It is up to that federal agency which has been empowered by Congress to act and regulate those working conditions to decide what rules and regulations are needed to ensure the health and safety of the employees. Thus, the Secretary cannot usurp authority to regulate these vessels; it must be left to the federal agency – in this

case the Coast Guard – which has been given the responsibility of dealing with that working environment.

iii. The Secretary's "Nook And Cranny" Interpretation Is Inconsistent With Her Own Enforcement Activities

The Secretary's position that seamen can only be adequately protected through her "nook and cranny" interpretation of Section 4(b)(1) is also belied by her own enforcement activities. Simply because there may not be a specific regulation governing every piece of equipment aboard a vessel does not mean that the working conditions of seamen are not adequately protected and regulated.

The concept of "seaworthiness" under maritime law is quite broad and covers virtually every possible health and safety hazard on vessels. If a piece of equipment or machinery aboard a vessel is unsafe or not fit for its intended use, then it presents an unseaworthy condition for which the owner or operator of the vessel is liable. *Mahnich v. Southern SS Company*, 321 U.S. 96, 99, 64 S.Ct. 455, 457 (1944). If a member of the crew is not properly trained this also presents an unseaworthy condition on the vessel. *Mahnich*, 321 U.S. at 103, 64 S.Ct. at 459. In short, any unsafe or unhealthy condition to which seamen aboard a vessel may be exposed, regardless of whether the vessel is classified as inspected or uninspected, presents an unseaworthy condition for which the owner or operator of the vessel is responsible.

Federal statutes ensure the seaworthiness of the vessel even in foreign ports and provide procedures for

seamen to protest if any part of the vessel is unsafe or unfit. *See* 46 U.S.C. § 10905. Thus seamen are actually provided greater protection than that afforded by OSHA since OSHA does not apply outside the United States and certain U.S. territories. *See* 29 U.S.C. § 653(a). The duty to provide a seaworthy vessel for seamen is much like the general duty clause imposed by OSHA on land-based employers under 29 U.S.C. § 654(a)(1). The Secretary has never hesitated to investigate and issue citations to employers under the general duty clause even though a specific OSHA regulation has not been violated. *See, e.g., Secretary of Labor v. Morrison-Knudsen/Yonker's Contracting Co.*, 16 BNA OSHC 1105, 1120-21 (No. 88-572, 1993); *Secretary of Labor v. Trans-Texas Well Service, Inc.*, 15 BNA OSHC 2219, 2220 (No. 91-0391, 1992).

It is disingenuous for the Secretary to now argue that her authority is broader than the specific regulations she promulgates but that other federal agencies such as the Coast Guard are limited in their authority and can only act if they have a specific regulation governing specific hazards. The Coast Guard has been empowered by Congress to "promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States." 14 U.S.C. § 2. If the Coast Guard has been less than diligent in fulfilling its responsibilities that is an issue to be addressed by Congress, not OSHA.

III. OSHA Jurisdiction Does Not Reach Vessels

A plain reading of the scope of OSHA as contained in its introductory paragraph does *not* extend its reach to include vessels. The Act provides that the geographic reach of OSHA is confined to "employment performed in a work place in a state . . . [and] Outer Continental Shelf Lands." 29 U.S.C. § 6539(a). As such, the Fifth Circuit has previously held that a vessel is not such a "work place." *Donovan v. Texaco, Inc.*, 720 F.2d 825, 829 (5th Cir. 1983).

IV. Petitioner's Reliance On Legislative History Is Misplaced

The legislative history of the Occupational Safety and Health Act manifests a clear congressional intent *not* to subject employers to the jurisdiction of both OSHA and another federal agency when that other federal agency has an affect on the occupational safety and health of working conditions over which that other federal agency both possesses and uses (in a manner which that other federal agency deems appropriate) statutory authority.

In the words of Mr. Steiger, one of the chief proponents of the Occupational Safety and Health Act:

> Both the substitute and H.R. 16785 provide that the Act shall not apply where another federal agency is exercising authority to prescribe or enforce occupational safety and health standards . . . While this section does not foreclose the authority of the Secretary of Labor in instances where another agency or department has statutory authority in the area of occupational safety and health but has taken no action, it is anticipated that these instances will be

> exceedingly rare. It is intended that the Secretary of Labor will *not* exercise his authority where another agency with appropriate jurisdiction has taken steps to exercise its authority, even though the action might be at the formative stage of regulations or enforcements. (Legislative History of the Occupational Safety and Health Act of 1970 "Legislative History", Subcommittee on Labor of the Committee on Labor and Public Welfare," 92nd Congress, 1st Session, p. 997).

Subjecting employers to double agency jurisdiction obviously involves a waste of the employer's resources. Congress expressly indicated an intent not to impose such a burden on employers. Section 8(d), 29 U.S.C. § 657(d) of the Occupational Safety and Health Act requires that information "shall be obtained with a minimum burden upon employers . . . " and that "[u]nnecessary duplication of efforts in obtaining information shall be reduced to the maximum extent feasible."

Subjecting employers to double agency jurisdiction involves a waste of administrative resources, too. Congress expressly indicated an intent not to waste national administrative resources through overlapping agency jurisdiction. Section 4(b)(3) of the Occupational Safety and Health Act, 29 U.S.C. § 653(b)(3) indicates the clear legislative intent "to avoid unnecessary duplication and to achieve coordination between this act and other Federal laws." The legislative history of Section 4(b)(3) clearly expresses Congress's determination "to avoid probable areas of duplication." 1970 Code Cong. & Adm. News, p. 5199.

Congress undoubtedly had in mind trying to avoid the waste of employer administrative and judicial resources which would inevitably result from overlapping agency jurisdiction when it said in Conference Report No. 91-1765 on the Occupational Safety and Health Act:

> It is understood by the conferees that in any enforcement proceedings brought under either this Act or under such other acts, the principle of collateral estoppel will apply. 1970 U.S. Code Cong. Adm. News, p. 5229.

That is exactly the case here! The United States Coast Guard performed an exhaustive investigation into this casualty, issued a certified blue ribbon report and absolved Mallard of any wrongdoing. OSHA, without performing any independent investigation of its own, simply copied the investigation material of the Coast Guard and then issued its proposed citation and penalties.

Congress clearly intended to give the Coast Guard exclusive jurisdiction to regulate marine safety and health conditions in recognition of the Coast Guard's special expertise in the marine area rather than to share jurisdiction between the expert Coast Guard and the inexpert (in the marine casualty area) Occupational Safety and Health Administration. It is up to the Coast Guard to decide what constitutes appropriate safety standards. If the Coast Guard decides that no regulation need be promulgated concerning a particular condition, that decision comprises the minimum safety standard. OSHA cannot prescribe a higher safety standard when the Coast Guard has decided that no regulation is needed.

This Court should follow the rationale expressed in the following language by an earlier Occupational Safety and Health Review Commission case: "Once another Federal agency exercises its authority over specific working conditions, OSHA cannot enforce its own regulations governing the same conditions. Section 4(b)(1) does not require that another agency exercise its authority in the same manner or in an equally stringent manner." *Mushroom Transportation Co., Inc.*, 1 BNA OSHC 1390, 1392 (1973).

CONCLUSION

In conclusion, the U.S. Fifth Circuit Court of Appeals, arguably the preeminent circuit court in the country, has reached the correct interpretation in this case. The Fifth Circuit's decision is in complete harmony with both congressional intent and federal regulatory framework. Accordingly, the Secretary's Petition is devoid of merit and should be denied.

DATED, this 8th day of January, 2001.

Respectfully submitted,

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